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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

ORIGINAL  
FILE

In the Matter of	)	GEN Docket No. 90-314
	)	ET Docket No. 92-100
Amendment of the Commission's	)	RM-7140, RM-7175, RM-7617, RM-7618,
Rules to Establish New Personal	)	RM-7760, RM-7782, RM-7860, RM-7977,
Communications Services	)	RM-7978, RM-7979, RM-7980
	)	PP-35 through PP-40
	)	PP-79 through PP-85
	)	(FCC 92-333)

REPLY COMMENTS OF THE  
NATIONAL ASSOCIATION OF  
REGULATORY UTILITY COMMISSIONERS

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In the Matter of  
  
Amendment of the Commission's Rules to Establish  
New Personal Communications Services

GEN Docket No. 90-314  
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	)	(FCC 92-333)

REPLY COMMENTS

OF THE

NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

Pursuant to Sections 1.49, 1.415, and 1.419 of the Federal Communications Commission's ("FCC" or "Commission") Rules of Practice and Procedure, 47 C.F.R. Sections 1.49, 1.415, and 1.419 (1991), the National Association of Regulatory Utility Commissioners ("NARUC") respectfully submits the following comments.

NARUC's comments address the November 9, 1992 initial comments filed to respond to the Commission's "Notice of Proposed Rulemaking and Tentative Decision" ("NPRM") as adopted on July 16, 1992, and released on August 14, 1992, in the above-captioned proceeding:

## I. DISCUSSION

## A. COMMON PRIVATE CARRIER STATUS AND PREEMPTION OF STATE AUTHORITY.

In paragraph 71 of the FCC's order, NPRM, mimeo at 30, the FCC suggests that

"....PCS is likely to be both a complement and potentially a competitor to local wireline competitor service. Initially, we expect that PCS primarily will complement LEC-provided wire loops, while over time PCS may become a full-fledged competitor to wireline service."

Not only does the NPRM describe the bulk of PCS services as both (a) LOCAL, i.e., predominately intrastate, and (b) supplanting segments of, or potentially competing directly with, a common carrier service like wireline POTS or cellular, but a large number of the commenters that provide a description of PCS service offer similar characterizations.<sup>1</sup>

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<sup>1</sup> See, e.g., the Initial Comments of (a) Telephone & Data Systems, Inc. at 22-23, noting the most significant applications of PCS technology are functionally indistinguishable from existing common carrier services, and OPASTCO & NRTA at 16 noting that PCS is likely to become a competitive substitute for local exchange service; (b) USTA at 6, Rock Hill Telephone Company at page 3, South Carolina Telephone Ass'n at 2, ALLTEL Corp. at 4, Time Warner at 2-4, and others which describe PCS as directing phone service to a person rather than a location - a service that obviously directly substitutes for existing local exchange service each time it is used; (c) CTIA at 72 suggesting that similar regulatory treatment is required for "these two similar and potentially competitive service providers." CTIA's sentiment, which clearly demonstrates that services that are indisputably classified as common carriage are, at least based upon the evidence of these commentors remarks, the functional equivalent of PCS within the meaning of Section 332 of the Communications Act, is echoed in the comments of Southwestern Bell at 26-27, Pacific Telesis at page 43, Cincinnati Bell at 20-21, Bell Atlantic Personal Communications, Inc. at pages 30-31, Ameritech at pages 21-23, McCaw at page 44, Florida Cellular at pages 13-14., Century Cellunet, Inc. at page 12, Rural Cellular Corporation at 1, Vanguard Cellular Systems, Inc. at pages 26 -27, ALLTEL Corporation at 4, 17, GTE Corporation at 49, Centel Corporation at 5, 24-27, United States Department of Justice at 5-7, and NARUC at 4.

NARUC does not believe that the record in this case will support classification of such LOCAL services as "private". As demonstrated by NARUC's initial comments, the statute and the jurisprudence clearly indicate that private carrier classifications, and/or preemption of state oversight, under such circumstances are not legally permissible. Moreover, even assuming, arguendo, that the Communications Act allows such services to be classified as "private", NARUC believes that the current record demonstrates that such status is inappropriate from a policy perspective.

**1. The Record Demonstrates that Private Carrier Classification of PCS is Inappropriate from a Policy Perspective.**

**a. Emergency Transmission Requirements Do Not Apply to Private Carriers.**

Classification of such services clearly is inappropriate from a policy perspective. One of the best record examples demonstrating the unsuitability of such an approach is found in the United States Department of Defense's Initial Comments at page 6. There, that agency notes that private carrier PCS providers would not be required to participate in the telecommunications services priority system (TSP). The TSP rules are applicable to common carriers only. This system has proven to be of great benefit for NSEP purposes, as demonstrated recently during the Hurricane Andrew disaster in Florida and Louisiana. If PCS is to be available to NSEP users in crisis situations, then there should be a way for the NSEP user to have priority in acquiring the service. The TSP system allows that to happen, but only with common carriers.

Similarly, federal and state restrictions currently placed on local carriers require the provision of access to all interexchange and local toll carriers and for such carriers to expeditiously route emergency calls to the proper local emergency service provider. Such restrictions would not necessarily apply to private carriers.<sup>2</sup>

- b. Common carriage assures the benefits of, inter alia, nondiscriminatory access, full interconnection, better resolution of technical quality issues, greater utilization of the network, just and reasonable rates, an enhanced ability to protect consumer interests, and a settled jurisprudential base on many important issues.

The record also clearly elucidates other advantages of common carrier status.

For example, Northern Telecom, on page 25 of its comments, notes that such classification ensures that nondiscriminatory access is available to all members of the public and suggests that full interconnection of wired and wireless networks is not possible if PCS is classified as private.

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<sup>2</sup> See also, Telephone & Data Systems, Inc's Initial Comments at page 25 where it notes that regulatory authorities have traditionally relied upon common carriers who provide the broad base of essential communications to participate in federal, state, and local safety efforts. Like the Department of Defense, TDS believes that PCS should be included in the mix of common carrier services to assure their availability to meet vital public responsibilities. Compare, NARUC's January 15, 1991 Comments in this docket, at page 8, where the organization expresses similar concerns and contends that PCS providers must be required to route all emergency calls in the fastest possible way to the proper local emergency service provider.

The Pennsylvania Public Service Commission notes that such status imposes requirements for just and reasonable rates, nondiscrimination, and limitations on foreign ownership. PaPUC Comments at 10-11.

Cincinnati Bell Telephone Company, in its comments at page 20, contends that the FCC's goals of universality and competitive delivery are best served by making PCS common carrier and insists that technical quality issues are best resolved in a common carrier context.

NYNEX suggests that the most effective way to protect consumer interests is to require common carrier status. Following in the same vein, NRTA and OPASTCO's joint comments, at 16-17, suggest that application of the common carriage designation allows the FCC to retain its full statutory powers to protect the public, particularly with regard to issues of universal service.

The National Telephone Cooperative Association suggests that a "common" designation will facilitate the resale of interconnected services and facilities and result in better utilization of the network. NTCA Comments at 11.

Finally, according to MCI's comments, at 23-24, another reason to require "common" status is the existing substantial body of case law which addresses, in the common carrier context, such issues as the rights and obligations of carriers to interconnect with one another. Such guidance will not be available if PCS is classified as private.



c. Common carriage assures a level playing field for similar services.

Even those few commenters, like Ameritech, which attempt to separate the issue of preemption of state authority from the common vs private discussion, urge that to assure the benefits of "competition", it is important for parity in regulatory treatment exist for cellular and PCS providers. See the citations in footnote 1, supra. ALLTEL's comments exhibit perhaps the most cogent formulation of this rationale for imposing common carrier status when it notes, on pages 16-17, that regulatory burdens are costly in terms of money, personnel and competitive responsiveness. Regulation (or the absence of it) can directly contribute to the success of one competitor over another. By assuring a consistent federal regulatory regime for all "potential" competing services, the FCC can obviously promote its desire for "competitive delivery". NPRM, para. 6, mimeo at 4. By fostering competition, the FCC can promote its competing values of universality and rapid deployment. As Omnipoint Communications, Inc. noted in its comments at page 4, competition will drive down usage and customer equipment costs and increase the number of people that can afford PCS by a factor of 40.

Indeed, CTIA's comment suggest that if, as strongly suggested by the record in this proceeding, cellular and PCS are close substitutes, the equal protection clause of the Fifth Amendment requires that they receive the same classification. CTIA Comments at 73.

As discussed below, some individual commenters, with little or no discussion of the requirements imposed by the Communications Act, have suggested that the FCC can, by fiat, turn INTRASTATE RADIO common carriers, i.e., cellular operators, into private carriers. Although the FCC clearly lacks the authority to take such action, even if it possessed such power, reclassifying the current cellular carriers would be bad policy.

Conferring private carriage on both cellular and PCS providers would ultimately multiply the competitive burdens borne by local exchange carriers subject to full common carrier obligations and would exacerbate crucial public interest concerns, including, inter alia, universal service/carrier of last resort obligations, left to state jurisdictions.

It is clear that by taking such action, the FCC would severely constrain states' abilities to enact safeguards necessary to protect monopoly telephone service customers while PCS growth occurs in the public-switched network.

2. Private Carrier PCS Designations and Preemption of State Authority can not be legally justified on the basis of the current record.

NARUC has already exhaustively treated this subject in its initial comments. However, a brief rebuttal of the conflicting rationales provided by other commenters follows:

Predictably, the comments of those that suggest (a) classifying PCS as private carriage, (b) classifying cellular services as private carriage, (c) preempting state regulation of PCS, or (d) allowing the PCS carrier to choose the status of its offering, eschewed any in-depth discussion of Section 332 of the Communications Act and related jurisprudence. Most only offer conclusory "policy" oriented justifications as support for their positions.

With the exception of NARUC and several state commissions, only the National Telecommunications Information Agency presented a detailed analysis of the statutory requirements imposed upon the Commission. Significantly, NTIA also suggested that any preemptive action at this stage of this proceeding, with the current record, is premature and could be subject to reversal by the Court of Appeals.

Telocator, Time Warner Telecommunications, NABER, and others suggest a flexible approach to categorization of PCS. Specifically, Telocator proposes to allow the PCS provider to make the election as to whether the service provided is treated as a common or private offering. Telocator Initial Comments at 13, 16. An allied notion, raised by several other commenters, is the idea that the Commission can, at its sole option, reclassify Part 22 Common Carrier cellular licensees as private carriers to achieve "regulatory parity" and thus maximize competition. See, e.g., Initial Comments of (a) Florida Cellular RSA Limited Partnership at 13-14, (b) Vanguard Cellular Systems, Inc. at 26-27, and (c) CTIA at 74-75.

The majority of the comments raising these somewhat novel ideas all share a conspicuous, and understandable, avoidance of any in-depth discussion of the requirements of the Communications Act.

CTIA, one of the few commenters in this group that makes a brief attempt to address the statute, begins its argument on page 74 of its comments with the following dicta, from Telocator v. FCC, 761 F.2d 768:

"...That section [332] allows the FCC, when faced with future technological and public policy advances, to create new systems that will make more efficient use of the spectrum."

Based upon this dicta, CTIA alleges that "...[a]s a new technology, PCS may be classified under Section 332 as private carriage"

Of course, CTIA (a) fails to include the next sentence of the excerpted dicta, which notes: "The only limitation is that systems with shared land stations are to be subjected to the interconnection restrictions." Under the rationale for "shared systems" presented in that case, PCS, which, like the offerings described in the NPRM, can complete calls over the current wireline network, clearly will involve "shared land stations".

CTIA also neglects to mention the critical factor in the Telocator case, which essentially found that a FCC designated "private carrier" was not in violation of Section 332 of the statute; The carrier involved in Telocator was not subject to the Section 332 interconnection restrictions because that carrier did not allow end-users to directly control the land station.

Again, PCS with the completion capability defined above would "control" the land station under the rationale presented in Telocator. In short, CTIA's statement that because PCS is a new technology the FCC can designate it as a private carrier derives absolutely no support from the case cited.

CTIA goes on to cite Commission precedents, including the now infamous Fleet Call decision, that have yet to be examined by any appellate court on review. As NARUC explained in great detail in its initial comments, the FCC's current interpretation of the Section 332 test, as exemplified in, inter alia, the Fleet Call opinion, obliterates Congressional intent. Presumably, in enacting Section 332, Congress intended to place some limits on the FCC's ability to create private carrier services. NARUC believes, inter alia, that limitation includes a requirement that spectrum allocated for "dispatch-type services" not be used to provide an interconnected telephone service that is functionally equivalent to common carrier cellular service.

If the current interpretation of Section 332 is ultimately accepted on review, it would appear that the FCC could define any service as private through an appropriate manipulation of accounting regulations to "assure" that interconnected service "is not being resold" for a profit. Of course, that interpretation of Section 332 is exactly what Telocator, CTIA and others are advocating.

The bulk of those that urge private carrier status for PCS and/or cellular, or suggest preemption of state regulation of common carrier PCS, suggest as rationales that (i) private carrier status and/or state regulation imposes burdensome state regulations. Ameritech at 19. Cablevision at 7-8; UTC at 39., (ii) the need for regulatory parity to maximize competition, supra and (iii) the service will develop faster as a private offering, Omipoint at 16.

Unfortunately, none of these rationales has anything to do with meeting the tests established by Sections 332 or Section 152(b). The Commission cannot ignore the tests established by the statute and just declare PCS to be private carriage by fiat, simply to meet its own objectives or the general objectives described by these parties.<sup>3</sup>

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<sup>3</sup> Compare, California v. FCC, 798 F.2d 1515,, at 1518-19, In this case, the Court responded to FCC arguments that are strikingly similar to those by the commenters discussed, supra. Specifically, the FCC argued that state regulation of an intrastate radio common carrier (i) "would prevent or delay" entry of FCC licensee's, that state regulations "may hinder the Commission's efforts to introduce healthy competition into radio transmission industries," and "frustrate the Commission's efforts to facilitate the utilization of the electromagnetic spectrum." In response, the Court found:

The rationales by which the Commission would justify this preemption proves to much, suggesting a wholesale displacement of state regulation..Any state regulation of radio common carriage might in some respect hinder entry. Moreover, any and all state regulation might trigger the three rationales by which the FCC would justify preemption of additional areas of state authority....Such a result would reduce Section 152 (b) to a nullity, violating the Congressional intent to establish a system of dual regulatory control.

**B. OTHER NARUC POSITIONS.**

As has frequently occurred in the past, the FCC released the text of its NPRM just after NARUC's July meetings and set the initial filing date before NARUC annual convention in November. Accordingly, in November, NARUC timely filed initial comments in this proceeding based upon past NARUC positions. Shortly thereafter, at its November annual meeting, NARUC passed resolution with positions upon issues raised in the NPRM. A copy of that resolution is attached as Appendix A for the record. A discussion of the additional points raised in that resolution, as well as NARUC positions on other aspects of the current record, follows.

1. Where economically justified, the FCC should award the maximum number of PCS licenses that can be assigned in the spectrum band allocated for PCS. Additionally, in keeping with NARUC's prior position favoring local or regional service areas, the FCC should further examine, along with other options, whether PCS service areas should be patterned after existing cellular service areas.

In previous resolutions, NARUC has supported spectrum allocation for PCS to multiple providers and favored local or regional serving areas for those PCS licensees, but has not commented on what it believes constitutes an optimal number of licensees or size of service areas.

NARUC's most recent resolution contends that quantitative data is not currently available that would provide adequate guidance in determining the optimal number of licensees that should be authorized in a service area or the optimal size of those service areas.

NARUC shares the FCC's penchant for competition and believes the potential for greater PCS competition and innovation could best be developed in certain areas by dividing the spectrum into the maximum number of blocks.

The resolution recommends further study on the optimal number of licenses per service area, but suggests where economically justified, that the FCC award the maximum number of PCS licenses that can be assigned in the spectrum band allocated for PCS. The resolution also contends, in keeping with NARUC's prior position favoring local or regional service areas, that the FCC should further examine, along with other options, whether PCS service areas should be patterned after the existing cellular service areas. As USTA noted in its initial comments at 19-21, the adoption of larger serving areas, particularly of nationwide scope, would not meet the Commission's objectives. Small serving areas will require less investment by each provider and allow for more individual competitors.

2. The FCC should ask the Federal-State Joint Board to examine the impact of the FCC's PCS proposals on existing federal and state support mechanisms and consider whether and what changes may be required to further universal service objectives.

The definition of PCS service areas should be carefully reviewed. Most types of PCS discussed in the NPRM will, like cellular service, be local in nature.



Local exchange competition arising from the local provision of PCS by entities other than local exchange carriers may impact existing sources of contribution that support universal service objectives. As the Pennsylvania Public Service Commission noted at page 11 of its comments:

PCS, if unregulated, could siphon off, in toto, LEC customers from low-cost, high return areas, and would wreak havoc on the established wire-based network. Thus, if PCS is not effectively managed, the LEC local loop network, containing various subsidies which provide universal telephone service, could be jeopardized."

Accordingly, NARUC urges the FCC to ask the Federal-State Joint Board to examine the impact of the FCC's PCS proposals on existing federal and state support mechanisms and consider whether and what changes may be required to further universal service objectives.

**3. The FCC should develop monitoring standards for PCS trials.**

To, inter alia, assure a complete record with maximum input from all interested parties on PCS development, and assist the Joint Board in its examination, the FCC should immediately (a) develop specific minimum monitoring standards for PCS trials, (b) make data on all trials publicly available quickly, and (c) work with State commissions to develop methods for, and provide complete reciprocal access to data relevant to - service monitoring.

4. LECs should not be precluded from providing PCS; Authorized PCS providers should not be affiliated.

NARUC believes that the local wireline carrier in each market area should not automatically be precluded from providing PCS service by the rules established in this proceeding. It is possible that new service providers may not be willing to enter some markets. This could be particularly true for small markets or rural markets. See, e.g., the Initial Comments filed by Concord Telephone Company at 2, NRTA & OPASTCO at 5-6, Palmetto Rural Telephone Cooperative, Inc. at 9, Rural Independent Coalition at 12, USTA at 22-27. So unless the local wireline carrier is allowed to provide service, consumers may not receive the opportunity to use advanced wireless telephone technologies. It may also be appropriate to allow the local company to provide PCS service to compete for revenues that may be lost to a competitor. This is not to say that the local wireline carrier should be guaranteed a license, nor given preferential treatment. It is merely meant to say that local wireline carriers should be provided an opportunity to be awarded a license.

In addition, NARUC does not believe that authorized service providers in a given geographic area should be affiliated with one another. Such affiliations would undermine the possible benefits, e.g., reasonable prices, innovative services, etc., that may be gained by competing service providers' efforts to attract customers.

5. The FCC should develop technical standards that assure that customer PSC equipment is transparent to the different possible local providers of service, and allows customers equal access to all providers.

Intelligent PCS that utilize the existing communications infrastructure offers the potential to minimize deployment cost, encourage ubiquity, and maximize communication services to the public. In addition, interconnectibility and unbundled functionality of all parts of the PCSs may provide numerous benefits to society, including reduced cost to consumers because of mass production economies of scale, accelerated deployment because of broad market availability, utility of the service because of wide geographical access and acceptance, and feature familiarity in multiple environments and applications.

Accordingly, NARUC urges that technical standards be developed that require the customer's portable communications device be transparent to, i.e., interconnectible with all providers of service, and that from the one device the customer can have equal access to all providers without purchasing separate terminal equipment. NARUC believes that the interconnection standards ultimately adopted should promote unbundling of all functionalities throughout the system, from the towers to networks and to the PCS devices.

II. CONCLUSION

In closing, the NARUC would like to affirm its support for the Commission's initiative in pursuing development and implementation of personal communication services. NARUC believes that the Communications Act requires, and the current record supports an FCC finding that PCS providers are common carriers and that effective implementation of such services requires imposition of the conditions described above. Accordingly, NARUC respectfully requests that the Commission, when considering further action in these dockets, carefully examine and give effect to these comments.

Respectfully Submitted,



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January 8, 1993

**In the Matter of Amendment of the Commission's Rules to Establish New  
Personal Communications Services**

**GEN Docket No. 90-314**

**APPENDIX A**

**Resolution on FCC's Notice of Proposed Rulemaking on Personal Communications Services**

**WHEREAS**, The Federal Communications Commission (FCC) proposes to amend its rules to establish new personal communications services (PCS), described in GEN Docket No. 90-314; and

**WHEREAS**, The FCC has sought comment on a number of issues of importance to state regulators, including:

- the number of licenses to be awarded in each service area;
- the appropriate geographic size of PCS service areas;
- the terms and conditions by which PCS providers will obtain access to and interconnection with the public switched network;
- whether PCS should be classified as a common carrier or private land mobile service;
- the FCC's jurisdictional authority to preempt state regulation of intrastate PCS services;
- the role of existing service providers, including cellular and LECs, in the provision of PCS;

**WHEREAS**, In previous resolutions adopted in November 1990 and February 1992, the National Association of Regulatory Utility Commissioners (NARUC) resolved that (1) PCS be regulated as a common carrier service; and (2) states may not be preempted under the "private carriage" standard as applied in the FCC's Fleet Call proceeding; and

**WHEREAS**, The NARUC has previously supported spectrum allocation for PCS to multiple providers and favored local or regional serving areas for those PCS licensees, but has not commented on what it believes constitutes an optimal number of licensees or size of service areas; and

**WHEREAS**, Quantitative data are not currently available that would provide adequate guidance in determining the optimal number of licensees that should be authorized in a service area or the optimal size of those service areas; and

**WHEREAS**, The potential for greater PCS competition and innovation could best be developed in certain areas by dividing the spectrum into the maximum number of blocks, which the FCC has determined to be five (5); and

**WHEREAS**, The definition of PCS service areas should be carefully reviewed especially considering that like cellular service, most PCS calls are expected to be local in nature; and

**WHEREAS**, Local exchange competition arising from the provision of PCS by entities other than local exchange carriers may impact existing sources of contribution that support universal service objectives; now, therefore, be it

**RESOLVED**, That the National Association of Regulatory Utility Commissioners (NARUC), convened at its 104 Annual Convention in Los Angeles, California, recommends further study on the optimal number of licenses per service area, but where economically justified, the FCC award the maximum number of PCS licenses that can be assigned in the spectrum band allocated for PCS; and be it further

**RESOLVED**, That the FCC further examine, along with other options, whether PCS service areas should be patterned after the existing cellular service areas; and be it further

**RESOLVED**, That the FCC take no action that would restrict the states' abilities to enact safeguards necessary to protect monopoly telephone service customers while PCS growth occurs in the public-switched network; and be it further

**RESOLVED**, That the Federal-State Joint Board examine the impact of the FCC's PCS proposals on existing federal and state support mechanisms and consider whether changes may be required to further universal service objectives.

---

Sponsored by the Committee on Communications  
Adopted November 18, 1992

In the Matter of Amendment of the Commission's Rules to Establish New  
Personal Communications Services

GEN Docket No. 90-314

CERTIFICATE OF SERVICE

I, JAMES BRADFORD RAMSAY, certify that a copy of the foregoing was  
sent by first class United States mail, postage prepaid, to all  
parties on the attached Service List.

A handwritten signature in dark ink, appearing to read "James Bradford Ramsay", is written over a horizontal line.

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January 8, 1992



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